Supreme Court, U. S.
FILED
APR 11 1975
MICHAEL RODAK, JR., CLERK

No. 74-634

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, THE NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

John J. Cleary
Warren R. Williamson
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amici Curiae
(714) 234-8467

Of Counsel,

Mr. Sheldon Portman, Chairman
California Public Defenders Association
Santa Clara County Public Defender

Mr. James Doherty
Chairman, Amicus Committee
National Legal Aid and
Defender Association

Mr. Fred Okrand
Legal Director
American Civil Liberties Union
of Southern California

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1974

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT LEE NOBLES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, THE NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, AND THE AMERICAN CIVIL LIBERTIES UNION FOR SOUTHERN CALIFORNIA AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

INDEX

Page

Statement of Interest of Amici Curiae.... 1

Summary of Argument..... 2

Argument:

I. The report of the defense investigator was protected from disclosure to the government by the Fifth Amendment privilege against self-incrimination..... 4

A. The privilege against compulsory self-incrimination extends to the report of the defense investigator such that the respondent properly invoked its protection to prevent disclosure of that report..... 4

II. The trial court's order deprived respondent of his right to the effective assistance of counsel and his right to present witnesses under the Sixth Amendment..... 17

III. The order of the court in this case violated the principle of reciprocity outlined in Wardius v. Oregon..... 22

Conclusion..... 31

CITATIONS

Cases:	Page
Black v. United States, 385 U.S. 26 (1966)	21
Boyd v. United States, 116 U.S. 616 (1886)	9, 11
Branzburg v. Hayes, 408 U.S. 665 (1972)	5
Brown v. United States, 356 U.S. 148 (1957)	14
Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951)	17
Couch v. United States, 409 U.S. 322 (1972)	5, 6, 16
Counselman v. Hitchcock, 142 U.S. 547 (1892)	9, 11
Entick v. Carrington, 19 How. St. Tr. 1029 (1765)	7
Gilday v. Commonwealth, 274 N.E. 2d 589 (Mass. Sup. Jud. Ct. 1971)	22
Goldstein v. Great Atlantic and Pacific Tea Co., Fla., 118 So. 253 (1960)	10
Griffin v. California, 380 U.S. 609 (1965)	12
Harris v. New York, 401 U.S. 222 (1971)	8, 14
Henfield v. United States, 118 F.2d 375 (D.C. Cir. 1941)	17
Hoffa v. United States, 385 U.S. 293 (1966)	21
In re Oliver, 333 U.S. 257 (1948)	13
Jencks v. United States, 353 U.S. 657 (1957)	23
McGautha v. California, 402 U.S. 183 (1970)	9, 18
McMann v. Richardson, 397 U.S. 759 (1970)	12
Malloy v. Hogan, 378 U.S. 1 (1964)	12

Cases - Continued	Page
Menendez v. United States, 393 F.2d 312 (5th Cir. 1968)	23
Miranda v. Arizona, 384 U.S. 436 (1966)	5, 9
Murphy v. Waterfront Commission, 378 U.S. 52 (1964)	12
Nardone v. United States, 308 U.S. 338 (1939)	5
O'Brien v. United States, 386 U.S. 345 (1966)	21
Palermo v. United States, 360 U.S. 343 (1954)	23
People v. Bennett, 29 N.Y.2d 462 (1972)	18
Powell v. Alabama, 287 U.S. 45 (1932)	17
Prudhomme v. Superior Court, 2 Cal. 3d 1320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970)	8
Raffle v. United States, 271 U.S. 494 (1925)	14
Reilly v. Berry, 250 N.Y. 456 (1929)	18
Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970)	22
Roe dem. Haldane v. Harvey, 4 Burr. 2489, 38 Eng. Rep. 302 (1769)	7
Schmerber v. California, 384 U.S. 757 (1966)	9, 11
Shephard v. Hunter, 163 F.2d 872 (10th Cir. 1947)	18
Sherbert v. Verner, 374 U.S. 398 (1963)	12
Simmons v. United States, 290 U.S. 377 (1968)	14
Specht v. Patterson, 386 U.S. 605 (1967)	13, 17
Spevack v. Klein, 385 U.S. 511 (1967)	12

Cases - Continued — Page

State v. Benner, 284 A.2d 91 (Maine Sup. Jud. Ct. 1971) 22
United States v. Augenblick, 393 U.S. 348 (1968) 23
United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) 5, 11, 17
United States v. Fratello, 44 F.R.D 444 (1968) 11, 12
United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965) 24
United States v. Kovel, 296 F.2d 918 (2d Cir. 1971) 10, 20
United States v. Missler, 414 F.2d 1293 (4th Cir. 1969) 23
United States v. Nixon, 418 U.S. 683 (1974) 5
United States v. Nobles, 501 F.2d 146 (9th Cir. 1971) 1, 6, 16
United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973) 23
United States v. White, 322 U.S. 694 (1944) 6
United States v. Wright, 489 F.2d 118 (D.C. Cir. 1973) 5, 6, 15
Warden v. Hayden, 387 U.S. 294 (1967). 11
Wardius v. Oregon, 412 U.S. 470 (1973) 3, 5, 18 22, 25 26, 28
Washington v. Texas, 388 U.S. 14 (1967) 13, 17
Williams v. Florida, 399 U.S. 78 (1969) 5, 6, 15

Constitution, Statutes and rules: — Page

United States Constitution:

Fifth Amendment..... 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 29, 30
Sixth Amendment..... 2, 13, 17, 30

18 U.S.C. 3500 (The Jencks Act). 3, 16, 20, 23, 26, 28, 30
18 U.S.C. 3500 (e) 23
18 U.S.C. 3500 (e)(1) 24

Federal Rules of Criminal Procedure:

Rule 16 20
Rule 29 7

Federal Rules of Evidence:

Rule 501 10
Rule 612 ..... 26, 27, 28
Rule 613 26
Rule 613(A) 26

Miscellaneous:

A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function, §4.1 (Approved Draft 1971)..... 18

A.B.A. Standards of Discovery and Procedure Before Trial Supplement, 5-6 (Approved Draft, October 1970) 22

Miscellaneous - Continued Page

Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U.L.Q. 279, 280 (1963).... 30

Freeman, The Public Defender System, J. Amer. Jud. Soc. 74 (1948) 19

Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960) 7

Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L. Rev. 89 (1965) 7

Moore, Criminal Discovery, 19 Hastings L.J. 865 (1968) 12, 13

Note, Agents Reports and the Attorney-Client Privilege, 21 U. Chi. L. Rev. 752 (1954) 10

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994 (1972) 13, 19

Note, Right to Aid in Addition to Counsel for Indigent Defendants, 47 Minn. L. Rev. 1054 (1963)... 18

Note, The Indigent's Right to Adequate Defense: Expert and Investigatorial Resources in Criminal Proceedings, 55 Corn. L. Rev. 632 (1970) 18

Miscellaneous - Continued Page

Sevilla, The Exclusionary Rule and Police Perjury, 11 S.D.L.Rev. 839 (1974) 20

The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342 (1972) 13

Wilkerson, Public Defenders As Their Clients See Them, 1 Am. J. of Crim. L. 141 (April 1972) 21

1974 U.S. Code Cong. and Ad. News, Vol. 12A (15 January 1975) 11

STATEMENT OF INTEREST OF AMICI CURIAE

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist public defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent criminal defendants. In this regard, the association is vitally concerned with any action which might have a substantial impact upon the rights of their clients and upon their ability as defense attorneys to protect these rights.

The American Civil Liberties Union of Southern California is a non-profit organization dedicated to the preservation of the personal guarantees of the Bill of Rights of the United States Constitution. The ACLU is, therefore, concerned with any decision of this Court which may effect the constitutional rights of any citizen or group of citizens.

The National Legal Aid and Defenders Association has a nationwide membership including legal aid and public defender offices as well as individual attorneys who are concerned with providing access to effective legal services to the poor. Because of their focus on the representation of indigents, and their position as a national association, NLADA is actively involved in providing input into action, legislative or judicial, which may be of consequence to the clients they represent.

Amici are extremely concerned over the outcome of the case at bar because of their common desire to see the important constitutional rights of citizens protected. The organizations involved in this brief feel that the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Nobles, 501 F.2d 146 (9th Cir. 1974) was proper. Were the order of the trial court upheld, it would

have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused, on the ability of defense attorneys to effectively represent their interests, and provide an unfair and unconstitutional advantage to the prosecution in federal criminal trials.

Amici fully agree with the position of the respondent that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was correct. This brief is submitted in support of that judgment.

SUMMARY OF ARGUMENT

The order of the trial court which was held to be reversible error by the Court of Appeals violated respondent's Fifth Amendment privilege against self-incrimination. Respondent's privilege, which extended to the defense investigator because of his close relationship to respondent's cause, protected the investigator's notes from disclosure to the prosecution. Although the notes were not the words of respondent as such, they were testimonial in nature, and, therefore, were covered by the Fifth Amendment. The trial court's order that the investigator either agree to surrender his notes (which related to an interview of prosecution witnesses) or forego the opportunity to testify, forced respondent to choose between giving up his Fifth Amendment right not to incriminate himself and his Sixth Amendment right to present witnesses in his behalf. This choice is constitutionally impermissible and amounts to a form of "compulsion." Because he himself did not testify, respondent did not waive any objection he might have had to this procedure by calling the investigator as a witness.

By precluding the use of the investigator's testimony regarding his interview with the prosecution witnesses, the court violated respondent's Sixth Amendment right to present witnesses and to

challenge the government's case. The inability to present this evidence also denied respondent his right to the effective assistance of counsel. If the trial court's order is permitted to stand, the Court's decision in that regard could have a detrimental impact on the ability of attorneys, particularly appointed counsel, to provide effective representation for those accused of criminal conduct.

Finally, the order of the trial court violated the principles outlined in Wardius v. Oregon, 412 U.S. 470 (1973), because it gave the prosecution access to discovery from respondent which respondent had no reciprocal right to demand from the prosecution. The investigator's report did not constitute his "statement" within the meaning of the Jencks Act, 18 U.S.C. 3500, and therefore a similar report in the hands of a government witness would not have been discoverable by respondent under the provisions of that Act.

I

THE REPORT OF THE DEFENSE INVESTIGATOR WAS PROTECTED FROM DISCLOSURE TO THE GOVERNMENT BY THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

A. The Privilege Against Compulsory Self-Incrimination Extends to the Report of the Defense Investigator such that the Respondent Properly Invoked its Protection to Prevent Disclosure of that Report.

The petitioner argues that the order of the trial court requiring that, as a condition precedent to testifying, the defense investigator from the Federal Public Defender's office agree to surrender to the prosecution his notes of the interview with the eyewitness did not violate respondent's Fifth Amendment right not to incriminate himself. This contention is based on two premises. First, the respondent's Fifth Amendment privilege does not extend to the notes of the investigator, and second that, even if the notes were covered by the privilege, respondent was not compelled to disclose them, and would have waived any objection to their introduction by putting the investigator on the stand. (Brief for Petitioner at 44-45, 52-54)

Dealing with these arguments in order, we confront at the outset what is perhaps the most significant issue in this case: Can a member of the defense team as closely allied to the defendant's cause as the defense investigator be compelled to disclose evidence which may tend to incriminate the accused?

In attempting to answer this question, this

court finds itself again facing the problem of resolving the conflict between the "search for truth" in criminal trials and the need to guarantee that a defendant in a criminal trial not be compelled to assist the State in proving his guilt. Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1969). In a recent opinion dealing with this troubling point, the Court noted:

> "The public. . .has a right to every man's evidence except for those persons protected by a constitutional, common law, or statutory privilege."

United States v. Nixon, 418 U.S. 683, 709 (1974) (citing Branzburg v. Hayes, 408 U.S. 665, 688 (1972)).

In light of this standard, the critical question is one of whether the "constitutional privilege" afforded respondent by the Fifth Amendment protected from disclosure to the government the notes of the investigator, despite their potential relevance in the search for truth at the trial. There is no question that the fact that evidence may be relevant is not alone enough to require disclosure of that evidence when disclosure would violate an over-riding public policy to protect an individual's constitutional rights. Nardone v. United States, 308 U.S. 338, 340 (1939). Cf. Couch v. United States, 409 U.S. 322 (1972); Miranda v. Arizona, 384 U.S. 436 (1966); United States v. Wright, 489 F.2d 118 (D.C. Cir. 1973); United States v. Cohen, 388 F.2d 464 (9th Cir. 1967). The principle has been expressed often and in the context of the issue now before the court, no better than this:

> "The defendant has a right under the Fifth Amendment to compel the state to investigate its own case, find its own evidence, and prove its own facts. The defense has no duty to help the prosecution convict the defendant

> We therefore reject any rule which would require the defense to turn over to the prosecution prior statements of defense witnesses which could be used by the prosecution as evidence against the accused."

United States v. Wright, supra at 1195. See Couch v. United States, 409 U.S. 322 (1972); Williams v. Florida, supra at 112 (Black and Douglas, J.J., dissenting); United States v. White, 322 U.S. 694, 698 (1944); United States v. Nobles, 501 F.2d 146, 155 (9th Cir. 1974).

The rationale for this position is a familiar one and is the same as that which was the basis for the inclusion of the Fifth Amendment by the Framers in the Bill of Rights.

> "Historically, the privilege sprang from an abhorrence of governmental assault against a single individual accused of crime and the temptation on the part of the State to resort to the expedient of compelling incriminating evidence from one's own mouth. United States v. White, [supra]. The Court has thought the privilege necessary to prevent any 'recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.'"

Couch v. United States, supra at 327.

This concept of not forcing from the accused evidence which may damage his cause is rooted deep

in our common law tradition.[1] Commentators have expressed real concern that the trend in recent years of allowing the State greater access to the defendant's case may lead to the excesses which the Fifth Amendment was designed to prevent.[2]

Petitioner argues that the respondent was not being required to "help the prosecution" convict him because they were not seeking to introduce the investigator's reports in their case in chief, and had already met the initial burden of establishing a prima facie case against respondent sufficient to meet the challenge of a motion for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure. (Brief for Petitioner at 56-57) The fallacy of this argument lies in its

---

1 "[I]n civil causes, the Court will force parties to produce evidence which may prove against themselves; or leave the refusal to do it (after proper notice) as a strong presumption to the jury **** But in a criminal or penal cause, the defendant is never forced to produce any evidence; though he should hold it in his hands in court."

Roe dem. Haldane v. Harvey, 4 Burr. 2489, 38 Eng. Rep. 302, 305 (K.B. 1769); cf. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

2 Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 Calif. L.Rev. 89 (1965); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L.J. 1149 (1960)

apparent assumption that any evidence introduced by the government following the close of their case in chief, no matter how incriminating, does not figure in the mind of the trier of fact when considering the issue of guilt or innocence. Anyone familiar with trial practice knows that this is not the case. See Harris v. New York, 401 U.S. 222 (1971). Experienced prosecutors are well aware of the strategic impact of a strong rebuttal case as are the courts. In setting forth a standard for determining whether an accused's Fifth Amendment rights were being violated by a discovery order, the California Supreme Court observed:

> "The privilege forbids compelled disclosures which could serve as 'link in a chain' of evidence tending to establish guilt of a criminal offense. . . ."

Prudhomme v. Superior Court, 2 Cal. 3d 320, 325, 326, 85 Cal. Rptr. 129, 131, 466 P.2d 673, 677 (1970).

The emptiness in the constitutional sense of any distinction between incriminating evidence that is introduced against a defendant during the prosecution's case in chief, and incriminating evidence used at later stages in the trial is well recognized:

> "The privilege against self-incrimination protects the individual from being held to incriminate himself in any manner. . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . . These statements are incriminating in any meaningful sense of the word. . . ."

Miranda v. Arizona, 384 U.S. at 476-477.[3]

Petitioner argues that even assuming that the materials sought from the defense investigator in this case could have incriminated respondent by serving as a "link in a chain" of evidence tending to establish his guilt, that the investigator was not covered by the privilege. A careful examination of both the nature of the coverage afforded by the Fifth Amendment and the relationship between defense investigator and the defendant's interests shows that the privilege does extend to prevent disclosure such as was ordered by the trial court here.

On the first point it is important to remember that ". . . the protection of the privilege 'is as broad as is the mischief against which it seeks to guard.'" Schmerber v. California, 384 U.S. 757, 764 (1966) (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)). Mindful of this fact, and of the "duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon," Boyd v. United States, 116 U.S. 616, 635 (1886), it has been observed that ". . . the Fifth Amendment marks 'a zone of privacy' which the government may not force a person to surrender." Schmerber, supra at 778 (Douglas, J., dissenting)

---

3 On this point it has been observed:

> ". . . [A] defendant whose motion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with a risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty."

McGautha v. California, 402 U.S. 183, 215 (1970).

Given the close relationship between the investigator for the defense and the accused's interests, it is clear that the reports of the investigator were within this "zone of privacy" and were protected from disclosure by respondent's privilege against self-incrimination. The proximity of this relationship is evident by the fact that, in the opinion of many authorities, investigators are included within the coverage of the attorney-client privilege. See e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); Goldstein v. Great Atlantic and Pacific Tea Co., Fla., 118 So. 253 (1960); Note, Agents Reports and the Attorney-Client Privilege, 21 U. Chi. L. Rev. 752, 753 (1954). In fact, as originally proposed by the Senate, the Federal Rules of Evidence, Rule 503, included within the lawyer-client privilege anyone ". . .employed to assist the lawyer in the rendition of professional legal services." The final version of the Rules, which are now in effect, does not include the specific privileges. All that remains is Rule 501 which provides in pertinent part:

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

In commenting on Rule 501, and the deletion of the specific privileges from the final version of the Rules, the Senate Report noted:

> "It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should

> not be understood as disapproving any recognition of a psychiatrist, patient or husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our actions should be understood as reflecting the view that recognition of a privilege based on confidential relationship and other privileges should be determined on a case-by-case basis."

1974 U.S. Code Cong. and Ad. News, Vol. 12A at 48-49 (15 January 1975).

Petitioner also contends, if somewhat obliquely, report of the investigator was not "testimonial" in character and therefore its disclosure is not protected by the Fifth Amendment. Schmerber v. California, 384 U.S. 757 (1966). This position does not comport with the requirement that constitutional provisions which protect personal rights be given a "liberal construction." Counselman v. Hitchcock, supra at 584-585. It also fails to consider that in the context of the case at bar, the order of the trial court would have required divulging the contents of a report which is, in itself, obviously of a testimonial nature. Boyd v. United States, supra; United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); United States v. Fratello, 44 F.R.D. 444 (1968). Cf. Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, supra.

B. The Respondent was Impermissibly Compelled to Surrender the Investigator's Report by the Trial Court's Order and His Calling of the Investigator as an Impeaching Witness Did Not Constitute a Waiver of His Fifth Amendment Privilege as to the Reports.

Petitioner argues that, even if the defense investigator's report of his interview with the eyewitnesses was covered by respondent's Fifth Amendment privilege, there was no impermissible compulsion, in the constitutional sense, for defendant to surrender these reports. Instead, it is asserted, respondent waived any objection he might have had by calling the investigator as a witness. On the first point, the Petitioner claims that "the Court's order did not create the kind of compulsion 'likely to exert such pressure upon an individual as to disable him from making a full and rational choice.'" and that therefore the Fifth Amendment is not implicated. (Brief for Petitioner at 49-50, citing McMann v. Richardson, 397 U.S. 759, 769 (1970)).

This position ignores reality as well as legal precedent. First, it has long been held that requiring a person, particularly a criminal defendant, to abandon important constitutional rights in order to gain some other benefit, is a form of compulsion. Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Sherbert v. Verner, 374 U.S. 398, 403-406 (1963). See also Moore, Criminal Discovery, 19 Hastings L.J. 865, 912-913 (1968). To say that criminal trial strategy sometimes requires "the making of difficult decisions" is no answer, for the courts have specifically held that options which exact a penalty upon the exercise of the privilege against self-incrimination violate the Fifth Amendment. United States v. Fratello, supra; cf. Griffin v. California, 380 U.S. 609 (1965); Malloy v. Hogan, 378 U.S. 1 (1964). And, as noted in Spevack v. Klein,

> "In this context 'penalty' is not restricted to fine or imprisonment. It means. . . the imposition of any sanction which makes the assertion of the Fifth Amendment privilege 'costly'. . . ."

385 U.S. 511 at 515 (1967).

In this case, the respondent was given a choice between exercising his Sixth Amendment right to effectively confront and cross examine the witnesses who testified against him, the eyewitnesses, by presenting evidence through the investigator that might have impeached their credibility, and exercising his Fifth Amendment right not to incriminate himself. There is, of course, no question that an accused's right to confront and cross examine witnesses who testify against him is a minimum requirement of due process. In re Oliver, 333 U.S. 257, 273 (1948); Washington v. Texas, 388 U.S. 14, 18 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

To preclude respondent from exercising this right was certainly a sanction of the most significant proportions and to require him to choose between the Sixth and Fifth Amendment rights confronts him with the kind of dilemma that rises to the level of constitutionally impermissible compulsion. [4] In discussing the problem confronting an accused faced with the choice of complying with court-ordered discovery which might incriminate him, or foregoing altogether the presentation of evidence which could be critical to his defense, one commentator noted:

> "[S]ince the evidence or witnesses involved might provide incriminating as well as exculpatory information, the defendant would be placed between the Scylla of providing the prosecutor with potentially incriminating information and the Charybdis of being precluded from offering elements of his defense."

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L. Rev. 994, 998 (1972).

---

4 The Preclusion Sanction - A Violation of the Constitutional Right to Present a Defense, 81 Yale L.J. 1342, 1354 (1972); Moore, Criminal Discovery, 19 Hastings L.J. 865, 912, 913 (1968).

By putting respondent in this position the trial court's order clearly created that kind of intolerable tension between constitutional rights which has been condemned by this Court. Simmons v. United States, 290 U.S. 377, 394 (1968).

Petitioner argues, however, that respondent has no standing to claim compulsion because his decision to call the defense investigator as a witness effectively waived any claim he might have had to the protection of the Fifth Amendment privilege as to the investigator's report. In support of this contention, petitioner cites a series of cases which deal with the concept of waiver of the privilege against self-incrimination. Of these cases, a number deal with situations where the accused himself elected to take the stand, thus exposing himself to cross examination. Harris v. New York, supra, McGautha v. California, 402 U.S. 183 (1970); Brown v. United States, 356 U.S. 148 (1957); Raffle v. United States, 271 U.S. 494 (1925). This case of course does not present the same situation. The incriminatory information would not have been made available to the prosecution because respondent chose to testify, but because he called a witness, the investigator.

The circumstances under which the investigator was called also points up a flaw in petitioner's waiver argument. In commenting on the cases where this Court has upheld notice-of-alibi statutes, which cases are relied upon by petitioner here in support of its position, the United States Court of Appeals for the District of Columbia observed:

> "There has been some attempt in recent years to increase the government's right to discovery in criminal cases - for example, through statutes requiring the defense to give pretrial notice of the names of witnesses to be

> called as part of an alibi defense. But as the Supreme Court has emphasized in holding such statutes constitutional under the Fifth Amendment, they only require the defense to turn over to the government information which the defense intends to reveal at trial. See Williams v. Florida, 399 U.S. 78, 85, (1970). Alibi statutes, the Court reasoned, affect only the timing of disclosure, and the defendant has no Fifth Amendment privilege to mount an eleventh hour defense. Id. at 82. The government's proposal in the instant case is entirely different. It would require the defense to turn over information which the defense never intended to use at trial."

United States v. Wright, 489 F.2d 1181, 1194 (D.C. Cir. 1973) (footnotes ommitted).

Similarly, the trial court's order in this case would have required respondent to disclose albeit during trial, information which he could not have intended before trial to use. The distinction which must be looked to exists between an accused's right to present a defense, and his right to challenge the government's case against him. In the former situation, with which the government's "waiver" cases deal, the affirmative presentation of evidence may well be considered sufficiently voluntary to

constitute a constitutionally-recognized relinquishment of privilege. [5] In the latter situation, the accused is entitled to challenge the government's case by cross examination, impeachment and surrebuttal, without ever offering evidence himself, or taking the stand. There was no way that respondent, given the Jencks Act, 18 U.S.C. 3500, could have planned to call the investigator for impeachment purposes until after the eyewitnesses had testified and, on cross examination, denied making their earlier statements.

---

5 The petitioner offers Couch v. United States, 409 U.S. 322 (1972) in support of the "waiver" argument.

In Couch the situation is distinguishable from that in Nobles. There the accused's voluntary relinquishment of incriminating documents to an accountant, who was not an employee of either the accused or his attorney, was held to prevent the assertion of the accused's privilege against self-incrimination as to those documents. In this case there was no "relinquishment" of the reports to the investigator, and the reports were prepared specifically for the purpose of assisting the accused in this case.

II

THE TRIAL COURT'S ORDER DEPRIVED RESPONDENT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO PRESENT WITNESSES UNDER THE SIXTH AMENDMENT.

The order of the trial court precluded respondent from offering impeachment evidence, and thus denied him the opportunity to effectively confront and cross examine the government eyewitnesses who placed him at the scene of the crime, certainly a critical element of proof in the case against him. By denying respondent this opportunity the trial court denied him also his constitutionally guaranteed right to the effective assistance of counsel and the right to present witnesses. Washington v. Texas, 388 U.S. 14 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Powell v. Alabama, 287 U.S. 45 (1932); Coplon v. United States, 191 F. 2d 749, 757 (D.C. Cir. 1951); Henfield v. United States, 118 F. 2d 375 (D.C. Cir. 1941) Cross examination of the eyewitnesses was a nullity absent the ability to present, through the investigator, the evidence of their prior inconsistent statements.

The trial court's order, if permitted to stand, could have far broader implications that its mere application to the respondent. As pointed out in United States v. Cohen:

> "An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has." 388 F. 2d at 467.

Today it is increasingly apparant that "adequate factual investigation is clearly a component of effective assistance of counsel . . . ." United States v. Wright,

supra at 1188 n. 6.[6] This is particularly true in light of the vastly superior resources of the government as compared to the accused's which give it a correspondingly greater investigative ability. Wardius v. Oregon, supra at 475 n. 9. Mr. Justice Douglas commented on this problem in his concurring opinion in Wardius where he said:

> "The Bill of Rights does not envision an adversary proceeding between two equal parties. If that were so, we might well benefit from procedures patterned after the Rules of the Marquis of Queensberry. But, the Constitution recognized the awesome power of indictment and the virtually limitless resources of government investigators. Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution. It is not for the courts to change that balance." 412 U.S. at 480.[7]

It is because of these realities that investigative services have been cited as one of the "chief assets" of defender offices. Freeman, The Public Defender System, J. Amer. Jud. Soc. 74, 76 (1948)

Yet now, even the little evidence that defender service investigators are able to obtain from government witnesses is held up as so inherently lacking in veracity (see Brief for Petitioner at 27 n. 11) that the production of their reports is made a condition

---

6 See e.g., Shephard v. Hunter, 163 F. 2d 872 (10th Cir. 1967); People v. Bennett, 29 N.Y. 2d 462 (1972); A.B.A. Project on Standards for Criminal Justice, Standards Relating to the Defense Function, § 4.1 (Approved Draft 1971). Providing such investigative assistance for the indigent defendant has proved difficult. See e.g. Reilly v. Berry, 250 N.Y. 456, 461 (1929); Note, The Indigent's Right to Adequate Defense: Expert and Investigatorial Resources in Criminal Proceedings, 55 Corn. L. Rev. 632 (1970); Note, Right to Aid in Addition to Counsel for Indigent Defendants. 47 Minn. L. Rev. 1054 (1963).

7 One commentator has noted:

> "Besides greater financial and staff resources in which to investigate and scientifically analyze evidence, the prosecutor has a number of tactical advantages. First, he begins his investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events. In addition to the advantage of timing, the prosecutor may compel people, including the defendant, to cooperate. Finally, respect for government authorities will cause many people to cooperate with the police or prosecutor voluntarily when they might not cooperate with the defendant." Note, Prosecutorial Discovery under Proposed Rule 16, 85 Harv. L. Rev. 994, 1018-1019 (1972)

precedent to their giving testimony in impeachment.[8] *Petitioner is in reality asking* that production of notes be made an essential element of the competence of a defense investigator as a witness. The government counterparts of defense investigators certainly do not find themselves similarly impugned by such a requirement. It is true, that if a verbatim report was made of a government witness's statement, a different situation might exist, but then the protection of Rule 16, Federal Rules of Criminal Procedure and the Jencks Act would apply.

There is no question but that if an order such as that of the trial court in this case were held to be permissible, that it could cause a serious disruption in the ability of defense counsel who regularly rely on investigators to help prepare their case, to adequately prepare for trial, particularly in situations involving complex factual issues. It is not unreasonable to foresee that investigators, fearful of disclosure of their reports, may cease to memorialize the results of their efforts. The delay between the time of their investigation and the time of trial could easily affect their ability to remember import- and facts which were of importance to the defense. Cf. United States v. Kovel, 296 F. 2d 918, 921 (2d Cir. 1961).

---

8 It is also interesting to note petitioner's contention that disclosure such as ordered by the trial judge here would help prevent perjury on the part of defender office investigators when the availability of discovery to the defense seems not in all cases to have corrected the same problem insofar as government investigators are concerned. See Sevilla, The Exclusionary Rule and Police Perjury, 11 S. D. L. Rev. 839 (1974).

In addition, it requires little imagination to picture *what regular disclosure of reports to the* prosecution by a member of the defense team would do to what is often an already-strained relationship between appointed counsel and his client.[9] It is no small irony that the availability of effective investigative services which is considered an advantage to the defendant suddenly becomes a disadvantage if an order such as that of the trial court in this case makes material for use by the prosecution. The position of the investigator as a member of the defense team is too closely identified with the interests of the accused to permit a disclosure such as was ordered by the trial court. Cf. Hoffa v. United States, 385 U.S. 293 (1966); O'Brien v. United States, 386 U.S. 345 (1966); Black v. United States, 385 U.S. 26 (1966).

---

9 Wilkerson, Public Defenders As Their Clients See Them, 1 Am. J. of Crim. L. 141 (April 1972).

III

THE ORDER OF THE COURT IN THIS CASE VIOLATED THE PRINCIPLE OF RECIPROCITY OUTLINED IN WARDIUS V. OREGON.

This Court's opinion in Wardius v. Oregon, supra, dealt with the question of reciprocal discovery under a notice-of-alibi statute. In Wardius, it was held that the Oregon notice-of-alibi statute was unconstitutional because it precluded an accused from presenting alibi evidence as a sanction for failing to notify the prosecution prior to trial of who the alibi-witnesses would be. The statute was held to be unconstitutional because it failed to provide the accused the right to reciprocal discovery of the State's rebuttal witnesses. [10] It was pointed out that:

> "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." 412 U.S. at 475.

It is clear, when analyzing the situation that presents itself here that the order of the trial court violated this principle.

The Jencks Act, 18 U.S.C. 3500, was passed by Congress in response to a concern by the government that this Court's decision in Jencks v. United States, 353 U.S. 657 (1957), would allow defendants too great access to government investigator's reports. See Palermo v. United States, 360 U.S. 343 (1954). Because of this concern, cases which have interpreted the Act have carefully limited its coverage. Only reports which can fairly be said to be the witness's own statement, a "substantial verbatim record" of the witness's words rather than an investigator's interpretation of a witness's words, are subject to disclosure to the defense. 18 U.S.C. 3500(e). Cf. United States v. Augenblick, 393 U.S. 348 (1968); Palermo v. United States, supra at 352; United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973); United States v. Missler, 414 F.2d 1293 (4th Cir. 1969); Menendez v.

---

10 On the advisability of ever preventing an accused from presenting evidence as a sanction for non-compliance with a court-ordered discovery rule, see Rodriguez v. Superior Court, 9 Cal. App. 3d 493, 88 Cal. Rptr. 154 (1970); State v. Benner, 284 A.2d 91 (Maine Sup. Jud. Ct. 1971); Gilday v. Commonwealth, 274 N.E. 2d 589 (Mass. Sup. Jud. Ct. 1971). The American Bar Association was able to conclude that the sanctions in situations of non-compliance with an alibi-notice requirement should not include the denial of the right of the accused to offer evidence. A.B.A. Standards of Discovery and Procedure Before Trial Supplement, 5-6 (Approved Draft, October 1970).

United States, 393 F.2d 312 (5th Cir. 1968). [11] Reports which do not meet this standard are protected from disclosure to the defense under the Act even if a government witness testifies during trial. United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965).

Petitioner appears to contend that a type of "reverse Jencks Act" should apply in this case to require defense witnesses to surrender to the prosecution copies of any prior statements they

---

11 18 U.S.C. 3500(e)(1) provides:

"The term statement, as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means---

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement. . . ."

have made upon completing their testimony. (Brief for Petitioner at 25) [12]

This requirement, it is argued, is mandated by the concept of fairness: What the defense is entitled to, the government should be as well; as well as the need for criminal trials to be a "search for truth."

Amici recognize that the task of the prosecution would be easier if they could have unrestricted access to defense files. But, apart from the concerns expressed in the preceding arguments, and the fact that such a result was not within the contemplation of Congress, United States v. Wright, supra at 1190, this practice at least insofar as it may be a justification for the court's order in this case, ignores the decision in Wardius v. Oregon, supra which holds that "fundamental fairness" requires that discovery, particularly that which flows from the defense to the prosecution, be reciprocal.

There was no evidence that the investigator's report was a "substantial verbatim record" of any prior statement of his. In fact there is nothing in the record which reflects that the investigator said

---

12 That this rationale is the basis for the trial court's ruling is apparent from a reading of the proceedings below. The following comment of the trial judge underscores this fact:

"It seems only fair, if the government gives you copies of all the statements made. I think that the government is entitled, in view of the attempt at least of impeachment to see a copy of the statement that this witness made."

Brief for Petitioner at 11.

anything about the eyewitnesses. The indication is to the contrary, that the report sought contained statements of the government witness not of the investigator. (Brief for Petitioner at 8-12) Thus if the court's order in this case were permitted to stand, the government would be entitled to discovery of reports prepared by defense investigators, whether or not they were "statements" within the meaning of the Jencks Act, while the defense would not have a similar right of disclosure from prosecution witnesses. This result is impermissible under Wardius.

The petitioner also argues that the order of the trial court was consistent with the new Federal Rules of Evidence, Rule 613(a), discussed by petitioner, provides:

> "In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown to opposing counsel."

Aside from the fact it was not in effect at the time that the events in this case occurred, Rule 613 does not affect the impropriety of the court's order. Even in the unlikely event that Rule 613 had some broadening impact on the application of the Jencks Act, the fact remains that the court's order required respondent to submit to a form of discovery impermissible under Wardius.

It is also contended that since Rule 612 of the Federal Rules of Evidence may have made the investigator's notes discoverable, the order of the

trial court was proper.[13] This argument, of course, has no application in the present situation because Rule 612 applies only to writings used by witnesses to refresh their memory either, "(1) while testifying, or (2) before testifying. . . ." A reading of the record discloses no evidence that the defense investigator had used his notes or would have used his notes to refresh his memory. Petitioner argues that "If Bond [the defense investigator] refreshed his recollection by reviewing his report before testifying. . . ." his report may

---

13 It is by no means evident that petitioner's argument in this regard is a tenable one. A reading of Rule 612 reveals that no sanctions are provided for an accused's failure to comply with its provisions, while failure of the prosecution to comply with the Rule can result in the striking of testimony or the declaring of a mistrial. This difference can be interpreted as a reflection of an intent on the part of the drafters not to make available any sanctions for non-compliance by the accused. See footnote 18, supra. This question should and need not be decided here because it is not even implicity presented in the record.

have been discoverable. (Brief for Petitioner at 42)[14] But this possibility, and that is all it is, is of no help to petitioner's position:

> "[I]t misses the point to argue that since the government might obtain

---

14 Petitioner invites this Court to presume that the defense investigator must have reviewed his notes prior to testifying or, alternatively, to hold that "a trial court might have inherent power to demand that the investigator refresh his recollection as a pre-condition to testifying" (Brief for Petitioner at 43 n. 23) thereby rendering the investigator's notes discoverable under Rule 612. Amici is tempted, totally as a conjectural matter, to accept this invitation, as a patent violation of the Wardius reciprocity principle would result. The Jencks Act has been interpreted to render only substantially verbatim accounts of government investigators producible while the petitioner's suggestion would render all defense investigator's account producible. This lack of reciprocity would clearly contravene Wardius.

BEST COPY AVAILABLE

> the papers by another means it should be permitted to compel the possessor to produce them over his claim of privilege - that the government might obtain these documents without compelling [the defendant] to incriminate himself is hardly a justification for compelling [him] to incriminate himself. We cannot ignore the dictates of the Fifth Amendment on the ground that it would be more convenient or efficient to do so."

United States v. Cohen, 388 F. 2d 464, 469 (9th Cir. 1967).

The order of the trial court here was in error as it has no support in statute or in case law, and, most importantly, because it required the defendant to be the source of information that could be used to convict him. On this point, the comments of Mr. Justice Brennan in discussing the rationale behind excluding evidence from criminal prosecutions obtained at the expense of constitutional guarantees are of significance:

> "Too many of us seem to have forgotten the true office of the constitutional procedural safeguards. . .We have forgotten that these safeguards, while they do indeed make harder the conviction of an accused, were not provided for that purpose -- the Framers of the Constitution weren't 'soft on criminals.' These safeguards are a check upon government -- to guarantee that government shall remain the

servant and not the master of us all."[15]

Until the "shield" provided government witnesses by the Jencks Act is removed by legislation, an order such as that proposed by the trial court denies the accused statutory parity with the prosecution in the area of discovery. That Congress failed to enact legislation providing for compelled disclosure by a member of the defense team of evidence which might damage the cause of the accused, may well be a recognition of the fundamental guarantees of the Fifth and Sixth Amendments.

---

15 Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Wash. U. L. Q. 279, 280 (1963)

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this Court affirm the decision of the Court of Appeals.

John J. Cleary
Warren R. Williamson
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amici Curiae

Of Counsel,

Mr. Sheldon Portman, Chairman
California Public Defenders Association
Santa Clara County Public Defender

Mr. James Doherty
Chairman, Amicus Committee
National Legal Aid and
Defender Association
Cook County Public Defender

Mr. Fred Okrand
Legal Director
American Civil Liberties Union
of Southern California

THE BRIEF SHOP

10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604

LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING

(213) 877-8620 763-2965

Produced By Copy-Print Method